Supreme Court, U.S.
FILED
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No. 92-1810

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1992

CREDITORS OF MICRO-TIME MANAGEMENT SYSTEMS, INC.,
Petitioners,

v.

ALLARD & FISH, P.C., a Michigan professional corporation; DAVID W. ALLARD, JR.; DEBORAH L. FISH,
Jointly and Severally,
Respondents

PETITIONER'S ANSWER TO RESPONDENTS MOTION FOR DAMAGES PURSUANT TO SUPREME COURT RULE 42.2 AND 28 U.S.C. §1927

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PETITIONER'S ANSWER TO RESPONDENTS MOTION FOR DAMAGES PURSUANT TO SUPREME COURT RULE 42.2 AND 28 U.S.C. §1927

Petitioners, Creditors of Micro Time Management Systems, Inc., by and through their attorneys, Law Offices of Lawrence J. Stockler & Associates, P.C., hereby answer respondents motion for damages pursuant to Supreme Court Rule 42.2 and 28 U.S.C. §1927 and for its answer states as follows:

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1. In answer to paragraph one (1), Petitioners assert that Supreme Court Rule 42.2 speaks for itself but denies that Petitioners Writ of Certiorari was frivolous whatsoever.

In Folak v Sheriff's Office of Cook County, et al., 579 F.Supp. 1338 (D.C. Ill. 1984) a sheriff who was discharged brought an action against the county sheriff's office alleging that he was deprived of a property interest in public employment without a hearing. Rather than filing an answer to plaintiff's complaint, defendant filed a 50 page factual stipulation signed by the plaintiff, publicly filed in a criminal case in which the plaintiff admitted to facts underlying numerous counts of mail fraud and extortion resulting in the termination of employment for the plaintiff. Defendant filed a motion for attorney fees and other sanctions pursuant to 28 U.S.C. §1927, arguing that plaintiff's lawsuit had no merit whatsoever. The court denied defendant's request for sanctions under 28 U.S.C. §1927. The court, in denying defendants motion for damages, concluded that the procedures outlined in the stipulation of facts by the plaintiff may have created a property interest, but they do not establish what process is due. In other words, the court concluded that plaintiff's claim could not support a bad faith award because the plaintiff may have had a property interest although it was undetermined what process was due.

See also Terrestrial Systems, Inc. v Fenstemaker, et al., 132 F.R.D. 71 (D.C. Colo. 1990) where the court denied an award of damages pursuant to 28 U.S.C. §1927 when the court concluded that plaintiff's counsel exercised reasonable inquiry into factual and legal foundation as to plaintiff's claims.

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In the matter presently before this court, this action was commenced by the Creditors, through Stockler, as a creditor and a member of the Creditor's Committee, on January 8, 1991 against Allard & Fish in the United Bankruptcy Court for the Eastern District of Michigan (R.1) as a result of the legal malpractice by the respondents herein. The Creditors of Micro Time Management Systems, Inc. are seeking to have their legal malpractice claim heard against respondents herein. The Court of Appeals action of unilaterally consolidating two separate appeals resulted in the denial of allowing the creditors of MTMS the opportunity to appeal, or maintain a malpractice claim against the attorneys for the trustees for MTMS. The respondents duty to the Creditors of MTMS are separate and distinct from their attorneys duties to the trustee. The Court of Appeals actions have resulted in the denial of allowing the Creditors of MTMS the opportunity to appeal resulting in petitioners Writ of Certiorari.

2. In answer to paragraph two (2), Petitioners assert that 28 U.S.C. §1927 speaks for itself but denies that Petitioners multiplied these proceedings unreasonably or vexatiously. In actuality, as a result of Respondents' misrepresentations and inaccuracies as well as their continued fabrication and twisting of the facts so as to not give this Honorable Court or the United States Court of Appeals for the Sixth Circuit a fair presentation of this case has resulted in excessive work, including, but not limited to, costs, expenses and attorney fees such that Respondents should be forced to compensate the Petitioners for the same.

3. In answer to paragraph three (3), Petitioners admit that Respondents rely on Engra, Inc. v Gabel, 958 F.2d 643 (C.A. 5, 1992) as

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well as 28 U.S.C. §1927, but deny that the same is applicable to Petitioners Writ of Certiorari presently before this Honorable Court.

In Engra, supra, the petitioner McFarland was not named as a party to the action between plaintiff and defendant and as a non-party, McFarland had no rights in the litigation between his client and the defendant unless and until he was permitted to intervene.

In the Writ of Certiorari presently before this Honorable Court, the Creditors of Micro Time Management Systems, Inc. were always a party to the action such that intervention was not necessary. The Creditors of Micro Time Management Systems, Inc. filed a complaint. This suit was brought on behalf of the creditors. This action was commenced by the creditors, through Stockler, as a creditor and a member of the Creditors Committee, on January 8, 1991 against Allard & Fish in the United States Bankruptcy Court for the Eastern District of Michigan (R.1)(which was removed to the United States District Court for the Eastern District of Michigan) as a result of the legal malpractice by the Respondents herein. The creditors loss has amounted to several millions of dollars. The Creditors of Micro Time Management Systems, Inc. are seeking to have their legal malpractice claim heard against Respondents herein. (R.1) The Court of Appeals action of unilaterally consolidating two separate appeals resulted in the denial of allowing the creditors of MTMS the opportunity to appeal, or maintain a malpractice claim against the attorneys for the trustees for MTMS. The Respondents duty to the creditors of MTMS are separate and distinct from their attorneys duties to the trustee and that duty was violated by never notifying the creditors nor the creditors committee of the conflict of interest between Bohl and Comerica Bank as well as

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failing to advise Bohl of his obligation as trustee as was found by bankruptcy Judge Steven W. Rhodes as detailed in Petitioners Writ. The Court of Appeals actions has resulted in the denial of allowing the creditors of MTMS the opportunity to appeal resulting in Petitioners Writ of Certiorari.

Warner Brothers, Inc. v Dae Rim Trading, Inc., 877 F2d 1120 (C.A. 2, 1989) is another case that Respondents rely on but misplace the argument from that case. Specifically, plaintiff Warner Brothers, Inc. brought its extended litigation so as to secure a substantial award of statutory damages and attorney fees as a lesson and warning to defendants and other copyright infringers. Id. at 1122. The court went further and found that Warner Brothers' attorney acted improper by not following applicable statutes and rules. For example, Warner Brothers' attorney referred to certain Federal Rules of Civil Procedure for authority to secure a preliminary injunction whereby the Federal Rule of Civil Procedure that Warner Brothers' attorney relied on was totally inapplicable and provided for no provision for a preliminary injunction. Specifically, the court found that the procedure conducted by Warner Brothers' attorneys and their agents were improper as well as their search conducted by certain agents were not authorized by statute. Additionally, certain discovery was conducted without notice to opposing counsel. The factual findings in that case lead the court to conclude that the action was conducted in a vexatious, oppressive and unreasonable manner.

In the Writ of Certiorari presently before this court, it is the unsecured Creditors position that, pursuant to due process of law, they are entitled to representation by their own attorney on their own

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appeal as well as maintaining malpractice claim against the attorneys for the trustee even when there are no provisions provided for in the plan of reorganization. The Creditors of MTMS are seeking to have their legal malpractice claim heard against the Respondents herein(R.1). The Court of Appeals actions of unilaterally consolidating two separate appeals resulted in the denial of allowing the Creditors of MTMS the opportunity to appeal, or maintain a malpractice claim against the attorneys for the trustees for MTMS. Respondents duty to the Creditors of MTMS are separate and distinct from their attorneys duties to the trustee and that duty was violated by never notifying the creditors nor the Creditors Committee of the conflict of interest between Bohl and Comerica Bank as well as failing to advise Bohl of his obligation as trustee as it was found by bankruptcy Judge Steven W. Rhodes as detailed by Petitioners Writ.

4. In answer to paragraph four (4), Petitioners admit that 28 U.S.C. §1927 speaks for itself but denies that these proceedings whatsoever are unreasonable and in fact the same is well grounded in fact and is warranted by existing law. In matter of Reed, 861 F.2d 1381 (C.A. 5, 1988), Respondents rely on that case but do not fairly represent that case to this Court. Specifically, Reed, a borrower, brought a federal court action against the lender, the Commercial State Bank of El Campo to recover on causes of action arising out of loan transaction. The district court dismissed Reed's case with prejudice under FRCP 37(B)(2)(c) for failure of Reed to comply with discovery orders. This dismissal with prejudice was not appealed. Almost seven month later, Reed filed a second complaint against the same defendant in state court, alleging almost identical facts as the complaint

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previously filed in federal court. On appeal, Reed raised issues that the court found to be frivolous and without merit. For example, Reed filed an appellate brief consisting of 88 pages on an issue that was never raised before the district court. Additionally, Reed raised the issues that the dismissal from the first case was not a final judgment on the merits when in fact, the dismissal was with prejudice. Additionally, Reed argued that the Federal Rules of Civil Procedure are unconstitutional where the court found that argument absolutely frivolous. The court found that Reed's attorneys attacks were on a proper final judgment entered with prejudice.

In the case presently before this Honorable Court, the creditors of MTMS claim against the Respondents herein is independent and distinct from MTMS's claim and does not belong and was not part of MTMS's plan of reorganization. As 11 U.S.C §1121(A)(B) provides, only the debtor may file a plan of reorganization. It was only MTMS that filed a plan of reorganization, not the creditors. The creditors were not seeking to reorganize MTMS's business and were thus not provided for in MTMS's plan of reorganization. Additionally, Respondents never raised as an affirmative defense that the creditors are not parties in interest, let alone parties to this lawsuit. Pursuant to FRCP 12(H), this defense is waived. Additionally, the courts have acknowledged the creditors of MTMS as parties to these proceedings since they continue to send notice and other court documents to Lawrence J. Stockler the attorney for the creditors of MTMS.

Additionally, the Honorable George LaPlata of the United States District Court, Eastern District of Michigan, wrote an opinion predicated upon a bankruptcy appeal arising out of Allard and Fish's

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displeasure with an award of attorney fees stated in his "Order Vacating Attorney Fee Award and Remanding Action to Bankruptcy Court," that Respondents herein had a duty to the creditors separate and distinct from their duties to the trustee. Accordingly, this suit was brought on behalf of the creditors. The creditors of MTMS are seeking to have their legal malpractice claim heard against respondents herein(R.1). The Court of Appeal's action of unilaterally consolidating two separate appeals resulted in the denial of allowing the creditors of MTMS the opportunity to appeal, or maintain a malpractice claim against the attorneys for the trustees for MTMS. Respondents duties to the creditors of MTMS are separate and distinct from their attorneys duties to the trustee and that duty was violated by never notifying the creditors nor the creditors committee of the conflict of interest between Bohl and Comerica Bank as well as failing to advise Bohl of his obligation as trustee as was found by bankruptcy Judge Steven W. Rhodes as detailed in Petitioners Writ of Certiorari.

5. In answer to paragraph five (5), Petitioners vehemently deny that Petitioners misrepresented anything on appeal. As a matter of fact, Respondents Brief in Opposition not only intentionally contained errors and omissions but further consisted of misrepresentations and inaccuracies requiring Petitioners to file a reply. As the records, pleadings and transcripts of this matter illustrates, Respondents continue to fabricate and twist the "facts" so as to not give this Honorable Court a fair presentation of this case.

6. In answer to paragraph six (6), Petitioners can neither admit nor deny that a Petition for Writ of Certiorari was filed on behalf of Micro Time Management Systems, Inc. and Otis Kirkland. If this is

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true, that the only parties represented therein are MTMS and Kirkland. Specifically, attached hereto as Exhibit A is a letter dated April 15, 1992 from attorney Lynn Shector stating that she did not represent the creditors on appeal but merely MTMS and Otis Kirkland, only. Additionally, the creditors of MTMS's claim against the Respondents herein is separate, independent and distinct from MTMS's claim and does not belong and was not part of MTMS's plan of reorganization. This action is brought on behalf of the creditors. Lawrence J. Stockler is a creditor, is a member of the creditors committee, is the attorney of record with the creditors approval. Stockler sent out notices to all of the creditors regarding representations in the Allard & Fish lawsuit (R.54), and had affirmative responses back from creditors. Attached hereto as Exhibit B is an order appointing unsecured creditors committee entered by the Honorable Steven W. Rhodes on March 16, 1988 listing those that have consented to be members of the unsecured creditors committee. As a result, the creditors of MTMS have the right to pick their own attorney which had nothing to do with Otis Kirkland or MTMS.

7. In answer to paragraph seven (7), Petitioners deny that its Writ of Certiorari was filed "purportedly" but in fact, this Petition for Writ of Certiorari (92-1810) was filed for the creditors of Micro Time Management Systems, Inc. Indeed, the creditors are parties to this action and in fact, the creditors of MTMS's claim against the Respondents herein is separate and distinct from MTMS's claim and does not belong and was not part of MTMS's plan of reorganization. As 11 U.S.C. §1121 (A)(b) provides, only the debtor may file a plan of reorganization. It was only MTMS who filed a plan

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of reorganization, not the creditors. The creditors were not seeking to reorganize MTMS's business and were thus not provided for in MTMS's plan of reorganization. Accordingly, this suit was brought on behalf of the creditors.

Additionally, the Honorable George LaPlata of the United States District Court, Eastern District of Michigan, wrote an opinion predicated upon a bankruptcy appeal arising out of Allard & Fish's displeasure with an award of attorney fees sated in his "Order Vacating Attorney Fees Award and Remanding Action to Bankruptcy Court" that Respondents herein had a duty to the creditors separate and distinct from their duties to the trustee. Accordingly, as previously stated, this suit was brought on behalf of the creditors.

8. In answer to paragraph eight (8), Petitioners deny that its appeal to the Sixth Circuit Court of Appeals was "purportedly" on behalf of the creditors but in fact WAS for the creditors.

9. In answer to paragraph nine (9), Petitioners vehemently deny as untrue that the creditors, including Stockler, are not now and never have been plaintiffs in this action. As previously stated, attached hereto as Exhibit A is a letter dated April 5, 1992 from attorney Lynn Shector stating that she did not represent the creditors on appeal, merely MTMS and Otis Kirkland only. Additionally, the creditors of MTMS's claim against the Respondents herein is independent and distinct from MTMS's claim and does not belong and was not part of MTMS's plan of reorganization. As 11 U.S.C. §1121(A)(b) provides, only the debtor may file a plan of reorganization. It was only MTMS that filed a plan of reorganization, not the creditors. Additionally, Respondents never raised as an affirmative defense that the creditors are not parties in

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interest, let alone parties to this lawsuit. Pursuant to Federal Rule of Civil Procedure 12(H), this defense is waived. Furthermore, the entitlement acknowledges the creditors of MTMS as a party to these proceedings. The court have acknowledged the creditors of MTMS as party to these proceedings since they continue to send notice and other court documents to the creditors of MTMS.

Additionally, the Honorable George LaPlata of the United States District Court, Eastern District of Michigan, wrote an opinion predicated upon a bankruptcy appeal arising out of Allard and Fish's displeasure with an award of attorney fees stated in his "Order Vacating Attorney fee Award and Remanding Action to Bankruptcy Court," that Respondents herein had a duty to the creditors separate and distinct from their duties to the trustee. Accordingly, this suit was brought on behalf of the creditors.

As previously indicated by Petitioners Writ of Certiorari, attorney Lawrence J. Stockler only withdrew from presenting MTMS and Kirkland, individually, the order submitted with the Motion to Withdraw expressly states that "It is hereby further ordered that Lawrence J. Stockler shall continue to represent the creditors of the estate of Micro Time Management Systems, Inc." (R.48, pages 11-12). No objections whatsoever were ever filed by Respondents to that motion or to the submitted order. No court ever ruled upon dismissing the pleadings filed by the creditors, except the Court of Appeals. Stockler is a creditor, is a member of the creditors committee and is the attorney for the creditors in this matter. An attorney who appears for a party in pending litigation is always presumed to have authority to do so until the contrary is shown.

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Stockler sent out notices to all of the creditors regarding representation in the Allard & Fish lawsuit (R.54), and had affirmative responses back from creditors. Attached hereto as Exhibit B is an order appointing unsecured creditors committee entered by the Honorable Steven W. Rhodes on March 16, 1988 listing those that have consented to be member of the unsecured creditors committee. As a result, the creditors of MTMS had the right to pick their own attorney which had nothing to do with Otis Kirkland or MTMS.

Additionally, the creditors through their attorney Stockler always continued to receive documents, notices and pleadings from the court, and Petitioners continued to file pleadings and other documentations with the courts, contrary to Respondents position. Additionally, not only was a class action not required pursuant to FRCP 23, but further, Respondents raise this issue for the first time on appeal.

10. In answer to paragraph ten (10), Petitioner denies completely as untrue. In further answer, the creditors of MTMS's claim against the Respondents herein is independent of MTMS's claim and does not and would not belong in MTMS's plan of reorganization. The creditors of MTMS are seeking to have their legal malpractice claim heard against Respondents herein. (R.1) The Court of Appeal's action of unilaterally consolidating two separate appeals resulted in the denial of allowing the creditors of MTMS the opportunity to appeal, or maintain a malpractice claim against the attorneys for the trustee for MTMS. Respondents duty to the creditors of MTMS are separate and distinct from their attorneys duties to the trustee and that duty was violated by never notifying the creditors nor the creditors committee of the conflict of interest between Bohl and Comerica Bank as well as failing

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to advise Bohl of his obligation as trustee as was found by Bankruptcy Judge Steven W. Rhodes as detailed in Petitioner's Writ of Certiorari.

11. In answer to paragraph eleven (11), Petitioner denies as untrue, Respondent obviously ignoring Petitioner's Writ of Certiorari as well as its Reply to Respondents Brief in Opposition. Specifically, this motion as well as Respondents Brief in Opposition intentionally contains errors and omissions and further consists of misrepresentations and inaccuracies with a twisting of "facts" so as to not give this Honorable Court a fair presentation of this case.

12. In answer to paragraph twelve (12), Petitioners object as to what costs, expenses or attorney fees Respondents have incurred as irrelevant and would advise the Respondents as a result of the legal malpractice by the Respondents herein, the creditors losses amounted to several millions of dollars. Additionally, Petitioner objects to references as to "phantom creditors" as the same being untrue and just another misrepresentation and inaccuracy by the Respondents to this court -- these creditors filed claims of several million dollars in Bankruptcy which were approved.

13. In answer to paragraph thirteen (13), Petitioner denies as untrue for the reasons set forth herein as well as the cases that Respondents are relying on (Engra, supra and Warner Brothers, supra,) which have been previously detailed herein, are not applicable to the case presently before this court.

14. In answer to paragraph fourteen (14), Petitioner vehemently denies as untrue and would assert to this Court that the creditors of MTMS's claim against the Respondents herein is independent and distinct

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from MTMS's claim and the creditors of MTMS are entitled to their day in court.

15. In answer to paragraph fifteen (15), Petitioner denies as untrue that there were any misrepresentations by Petitioners to this court. In further answer, Respondents once again assert that certain documents or transcripts were never part of the record below. In actuality, the same is part of the joint appendix filed in this matter. For example, the August 14, 1990 transcript that Respondents refer to are a part of the joint appendix as R.6.

16. In answer to paragraph sixteen (16), Petitioners deny the allegations as set forth and rely on its Writ of Certiorari as well as Reply to Respondents Brief in Opposition as previously filed with this court. As the records, pleadings and transcripts of this matter illustrates, Respondents continue to fabricate and twist the "facts" so as to not give this Honorable Court a fair presentation of this case. Additionally, Respondents asserts that Stockler references and quotes R.67 in its brief. However, Petitioners do not rely or identify or utilize R.67. Accordingly, once again, Respondents continue to fabricate and twist the "facts" as to not give this Honorable Court a fair representation of this case. Additionally, Respondents refer to pages 10, 24-25 and 39-40 of Petitioners Brief, asserting that Petitioner is referencing and quoting a September 16, 1991 opinion. Any reference to any opinion in this matter is substantiated by the records pleadings and transcripts as part of the joint appendix.

17. In answer to paragraph seventeen (17), any reference to the December 17, 1990 bankruptcy court hearing was to clarify Respondents misrepresentations as to the creditors not having any standing.

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Specifically, as to the Motion to Reopen the Bankruptcy case on November 154, 1990, the motion was denied by the bankruptcy court BECAUSE THE BANKRUPTCY COURT FOUND THAT IT WAS NOT NECESSARY TO REOPEN THE CASE SINCE THE CASE WAS NEVER CLOSED. THERE WAS NO FINDING WHATSOEVER THAT THE UNSECURED CREDITORS COMMITTEE HAD NOT STANDING TO PURSUE AN ACTION FOR LEGAL MALPRACTICE. More specifically, the Court of Appeals for the Sixth Circuit's finding that Stockler's Motion to Reopen the Bankruptcy Case to pursue a cause of action against Allard & Fish for alleged legal malpractice was incomplete. Specifically, the creditors, through Lawrence J. Stockler as a creditors, a member of the creditors committee, moved to reopen the Chapter 11 proceedings in order to file a lawsuit against Allard and Fish, P.C., David W. Allard and Deborah L. Fish, whereby the Honorable Steven W. Rhodes heard the motion and determined that it was not necessary to open the proceedings in order for such a lawsuit to be filed since the bankruptcy case was never closed.

18. In answer to paragraph eighteen (18), Petitioners deny as untrue that there was any misleading or misrepresentation to this court by Petitioners herein. As previously stated and reiterated within Petitioners Writ of Certiorari as well as its Reply to Respondents Brief in Opposition, the constitutional provisions involved as provided for were presented at the Sixth Circuit Court of Appeals and are properly before this court. As a result of the Court of Appeals for the Sixth Circuit unilaterally consolidating as one appeal case 91-2260 and 91-2261, the Court of Appeals for the Sixth Circuit has violated the creditors due process of law whereby the creditors are left without counsel, without a remedy, without this appeal, without due process and

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equal protection of law. Petitioners other arguments are properly before this court where the relief sought should be granted by this Honorable Court and this matter should be ruled upon by this Court in holding that the unsecured creditors, pursuant to due process of law, are entitled to representation by their own attorney on their own appeal as well as maintain a malpractice claim against the attorneys for the trustee even when there are no provisions provided for in the plan of reorganization.

More importantly, Petitioners vehemently deny of any preconfirmation knowledge of any conflict of interest until the hearing before the Honorable Steven W. Rhodes on August 14, 1990. Additionally, it is obvious that Respondents intentionally misrepresent the records, pleadings and transcripts of this matter and fabricate and twist the "facts" so as to not give this Court a fair presentation of this case. Petitioner further objects to Respondents reference of "non party appeal" and relies completely on its Writ of Certiorari as well as its Reply to Respondents Brief in Opposition.

19. In answer to paragraph nineteen (19), Petitioners deny as untrue, Petitioners Writ of Certiorari being far from frivolous or vexatious. These Creditors lost several millions of dollars that were not protected in bankruptcy as a result of legal malpractice.

20. In answer to paragraph twenty (20), no answer is necessary since Respondents Brief in Opposition intentionally contains errors and omission and further consists of misrepresentations and inaccuracies that required Petitioners to file a reply as the records, pleadings and transcripts of this matter illustrates, respondents continue to

fabricate and twist the "facts" so as to not give this Honorable Court a fair presentation of this case.

RELIEF REQUESTED

WHEREFORE, Petitioners, the Creditors of Micro Time Management Systems, Inc., by and through their attorneys, Law Offices of Lawrence J. Stockler & Associates, P.C. respectfully requests this Honorable Court to deny Respondents motion for damages and further requests this court to hold that the unsecured creditors pursuant to due process of law, are entitled to representation by their own attorney on their own appeal as well as maintaining malpractice claim against the attorneys for the trustee even when there are no provisions provided for in the plan of reorganization. In the alternative, this matter should be remanded to the United District Court for the Eastern District of Michigan to Reinstate Petitioners Complaint and have the trier of fact rule on questions of fact and to award petitioners such further relief this court deems just and appropriate.

Respectfully submitted,

LAWRENCE J. STOCKLER & ASSOCIATES, P.C.

BY: _____

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